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No. 75-357

In the Supreme Court of the United States

OCTOBER TERM, 1975

VINCENT ALOI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
KENNETH C. SPELLIAS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-34a) is reported at 511 F.2d 585. The opinion of the court of appeals denying a petition for rehearing (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1975. A timely petition for rehearing was denied on July 7, 1975 (Pet. App. 1a-2a).

On July 28, 1975 Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 5, 1975, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court adequately instructed the jury as to the elements involved in "willful" "use" of an offering circular for shares.

2. Whether the district court must allow a defendant a full adversarial hearing concerning factors taken into consideration in imposing sentence.

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. 77s(a) and 77x, and 17 C.F.R. 230.256 (e), are set out at Pet. App. 35a-38a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343 (Count 10), willful use of a false and misleading offering circular for the sale of securities, in violation of 15 U.S.C. 77s, 77x and 17 C.F.R. 230.256 (Count 18), and conspiracy to commit these offenses, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to consecutive terms of five years' imprisonment on Count 1 and four years' imprisonment on Count 18; a term of five

years' imprisonment imposed on Count 10 was suspended in favor of five years' probation. All sentences run consecutively to a previously imposed state sentence. Petitioner was fined $10,000 on Count 1, $1,000 on Count 10, and $5,000 on Count 18. The court of appeals affirmed (511 F.2d 585; Pet. App. 3a-34a).

The evidence introduced during the lengthy trial is summarized by the court of appeals. There was a complicated conspiracy to sell to the public common stock of At-Your-Service Leasing Corp. (AYSL), which was in a weak financial condition. AYSL planned a public offering of 100,000 shares at $3 a share, 50,000 shares of which had to be sold by July 7, 1970, within 90 days of the date upon which AYSL filed with the Securities and Exchange Commission an offering circular and other papers designating the issue as an unregistered offering (Pet. App. 5a, 6a).

An offering circular was prepared. Because it demonstrated the precarious financial posture of AYSL, no one offered to purchase the shares. In order to rectify this problem, the conspirators engaged Michael Hellerman, a notorious stock swindler, to see whether he could sell the stock. Hellerman, after seeing the offering circular, agreed to sell 50,000 shares of stock in return for $45,000, half of which was to be paid immediately in order to bribe brokers. Hellerman's involvement was arranged with the help of conspirators Sebastian Aloi (petitioner's father), John Dioguardi (who "owned" part of Hellerman's profits), and others (*id.* at 6a-7a).

Shortly after the scheme was put into operation, Pasquale Fusco and John Savino learned of Hellerman's expected profit and became disgruntled because Hellerman had not arranged to repay them a debt of $10,000. Fusco told Hellerman that he (Fusco) would contact petitioner to help them get their money, and Hellerman desisted in his efforts to sell the stock. When Edmund Graifer, one of the principals of AYSL, protested to petitioner's father, Sebastian Aloi, the latter told Graifer not to worry and called petitioner. Immediately after the conversation (which was in Italian), Sebastian Aloi told Graifer that everything would be straightened out and that Hellerman would be permitted to complete the deal. Dioguardi later informed Hellerman that petitioner had specified some changes in the terms of the deal. Out of the $45,000 Hellerman was to receive, Fusco and Savino were to receive $10,000, Ralph Lombardo (another conspirator) was to receive $10,000 owed him by Hellerman, and Dioguardi was to receive the remaining $25,000 (Pet. App. 7a-8a).

Hellerman succeeded in obtaining $127,500 for shares of AYSL stock. In August 1970 Graifer delivered $45,000 from the proceeds to Lombardo, who in turn gave it to Dioguardi. Dioguardi gave $20,000 to petitioner, who distributed $10,000 to Fusco and Savino and $10,000 to Lombardo (*id.* at 9a).

In sum, the evidence showed that "what had started as an effort to raise money for AYSL had been taken over by Hellerman, Lombardo, [petitioner] and Dioguardi as a scheme to obtain money from the public

via the sale of AYSL stock for their own use and purpose without disclosure of this fact to the purchasers" (Pet. App. 9a).

ARGUMENT

1. Count 18 charged petitioner with willfully and knowingly using and causing to be used a false and misleading offering circular. Although petitioner did not take part in the sales efforts, the district court submitted this count to the jury, charging it that each conspirator is liable for substantive crimes committed by others in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640. The court charged (Tr. 5495):

> I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation [*sic*] of the conspirators, you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in count 18 of the indictment.

a. Petitioner contends that this instruction was insufficient because it failed to charge the jury that it was required to find that some party *willfully* used a misleading circular. However, petitioner did not object to the instruction given and, under Fed. R. Crim. P. 30, cannot object now.[1] If the charge was

[1] The district court offered all counsel an opportunity to object to the charge given and supplemented his charge pur-

error at all, it was not such plain error that the lack of objection can be overlooked. The charge as a whole adequately apprised the jury that in order to find petitioner guilty the specified acts had to have been done willfully rather than by negligence, inadvertence or mistake. The court advised the jury that to find any defendant guilty of Count 18 it would have to find (1) that the defendant was guilty of conspiracy and (2) that the issuance of a misleading circular was within the contemplation of the conspirators (Tr. 5495). While the district court did not specifically recite the statute and its precise terms, it furnished the jury copies of the indictment for use during their deliberations. The indictment clearly states that the charge involves willfulness. Finally, later in the charge the court instructed the jury on other substantive counts in light of *Pinkerton* and informed it that all such acts must have been deliberate and within the contemplation of the conspirators to justify derivative liability (Tr. 5497, 5499, 5516).

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suant to a request from defense counsel (Tr. 5502-5518). However, counsel did not object to the charge on the grounds presently set forth and thereby failed to preserve the issue. *United States* v. *Williams*, 455 F.2d 361, 365 (C.A. 9), certiorari denied, 409 U.S. 857; *United States* v. *Leach*, 427 F.2d 1107, 1113 (C.A. 1), certiorari denied, 400 U.S. 829. Petitioner's observation that the government had requested a willfulness instruction and that the court had not advised counsel that such an instruction would not be given (Pet. 17-20) is immaterial; petitioner had ample (and unused) opportunity to object to the charge at the proper time—after it was given.

b. Petitioner also objects to the charge on Count 18 on the ground that the court referred to the "issuance" (Tr. 5495) of the misleading circular rather than (as the indictment charged) the "use" of it (Pet. 14-17). Again, no objection was made at trial, and the error, if any, is hardly "plain."

The court of appeals held that the offering circular was "used" because it was filed with the SEC and remained filed, unamended, lending an "aura of legitimacy to the scheme" (Pet. App. 28a). As the court held, the circular should have been amended to reflect the conspirators' plan for distribution of the proceeds to repay private debts. When viewed in this context the court's charge was sufficient. The court instructed the jury (Tr. 5495):

> Count 18 charges in effect that this printed prospectus or brochure about which you heard so much, namely Exhibit [?] was false and misleading in that it failed to disclose several material facts including among others, that Hellerman was involved in the deal and that some $45,000 would be siphoned off to the five defendants originally on trial before you.
>
> I needn't trouble you with reciting the other omissions which you have already heard about.
>
> I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.

This charge specifically drew the jury's attention to the critical failing of the circular arising out of circumstances after its filing. The court also instructed the jury that it could hold conspirators responsible only for substantive crimes occurring after they became members of the conspiracy (Tr. 5502). The instructions actually given, and the jury's possession of the indictment, answer the contention that the district court's use of the word "issuance" could be read as meaning "filed"—an act prior to the conspiracy. It is apparent that the district court was using the term "issuance" synonymously with "use" and that the jury so understood.

2. Petitioner finally contends (Pet. 21-29) that the sentences imposed denied him due process of law because their severity was caused by allegations of "other crimes" concerning which he was not offered an opportunity to confront and cross-examine his accusers. However, sentences imposed by district courts ordinarily are not reviewable. *Dorszynski* v. *United States*, 418 U.S. 424. It is also well established that the district court has wide discretion to determine what information to consider and what weight to give to that information. *United States* v. *Tucker*, 404 U.S. 443, 446-447. A sentence within the statutory limits is subject to attack only when based upon improper or inaccurate information, or when the district court has abdicated the exercise of its discretion. See *United States* v. *Foss*, 501 F.2d 522 (C.A. 1). A sentencing judge is entitled to "con-

duct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, *supra*, 404 U.S. at 446. And in determining the appropriate sentence for a particular defendant, the sentencing judge may consider evidence of crimes for which that defendant has not been convicted. *Williams* v. *New York*, 337 U.S. 241, 244. Petitioner offers no persuasive reason to reexamine these rules, which, *Dorszynski* held, should be followed unless and until altered by Congress.

Moreover, the record clearly demonstrates that petitioner was not sentenced for other crimes not resulting in conviction or on the basis of unsupported allegations. Although the court alluded to many allegations listed in the presentence report (Hr. 22-23),[2] petitioner's perjury conviction in state court, and the likelihood that the conviction indicated some involvement by petitioner in an unsolved murder (Hr. 23), the merits of these allegations were debated at length in a hearing. Petitioner had ample opportunity to correct factual misimpressions. And the court specifically disclaimed any reliance on these allegations (Hr. 23-25).[3] The court relied instead upon the

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[2] "Hr." refers to the transcript of the sentencing proceeding held on February 5, 1974.

[3] The conflict among the circuits to which petitioner alludes (Pet. 26-27) concerns the weight that can be given to particular allegations of misconduct. Here, however, the court altogether disclaimed reliance upon petitioner's prior misconduct.

consequence of the scheme for which petitioner was convicted: the public's loss of enormous sums of money (Hr. 25).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
KENNETH G. SPILLIAS,
Attorneys.

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